Gainesville Manufacturing Co., Inc. a Subsidiary of Spencer Industries, Inc. *and* International Ladies' Garment Workers' Union, AFL-CIO. Case 10-CA-19132

23 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 13 September 1983 Administrative Law Judge Hutton S. Brandon issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision[1] and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Gainesville Manufacturing Company, Inc., a subsidiary of Spencer Industries, Inc., Gainesville, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge. This case was tried at Atlanta, Georgia, on July 14-15, 1983. The charge was filed on April 1, 1983, by International Ladies' Garment Workers' Union, AFL-CIO (the Union or the Charging Party), alleging violations of Section 8(a)(1) of the National Labor Relations Act (the Act) by Gainesville Manufacturing Co., Inc., a Subsidiary of Spencer Industries, Inc. (Respondent or the Company). A complaint in the case was issued by Region 10 of the National Labor Relations Board (the Board) on April 29, 1983, and Respondent filed a timely answer to the complaint.[1] The issue presented by the complaint and answer is whether Respondent on October 13, 1983, unlawfully (a) prohibited its employees from joining or engaging in activities on behalf of the Union after work and off company property, and (b) closely watched the union activities of its employees.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the position and arguments of the parties at the hearing and the written briefs filed by the General Counsel and the Charging Party, I make the following

FINDINGS OF FACT

I. JUSRISDICTION

Respondent is a Georgia corporation with an office and place of business in Gainesville, Georgia, where it is engaged in the manufacture of apparel. During the calendar year preceding issuance of the complaint the Respondent sold and shipped from its Gainesville facility finished products valued in excess of $50,000 directly to customers located outside the State of Georgia. The complaint alleges, Respondent by its answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint also alleges, Respondent at the hearing stipulated, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Testimony*

The violations of the Act attributed to Respondent grow out of the events on the afternoon of October 13,

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[1] The handbilling in this case occurred on 13 October 1982, not 1983, as incorrectly set forth in the attached decision.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

However, in affirming the judge's discrediting of employee Bagwell's testimony, we find it unnecessary to rely on the judge's characterization of Bagwell as an "officious intermeddler" who attempted to "curry favor of Respondent." There is scant evidence in the record to support such a characterization. Instead, we rely on the following factors: Bagwell's testimony is substantially inconsistent with that of the other five witnesses who testified about the events in question; according to Bagwell, he was "guessing" when he estimated that one of the union representatives advanced "at least 75 feet" onto the Respondent's property; and by his own estimation, Bagwell observed the incident in question from a distance of at least 80 yards.

In affirming the judge's finding, in fn. 3 of his decision, that the Respondent did not dispute the existence of the public right-of-way along the road in front of the Respondent's plant, we note not only the acknowledgement made by the Respondent's supervisor, Castleberry, to union representative Sala, of the existence of this right-of-way, but also the testimony of the Respondent's manufacturing manager, Tanner, that he did not dispute the existence of the right-of-way, and that his position was that if the union representatives went *past* the right-of-way, then they would be trespassing.

[3] Member Dennis agrees with the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act by engaging in surveillance of its employees' union activities, but relies solely on the fact that the Respondent observed the handbilling from approximately 2 to 3 feet away after attempting to block the distribution by stepping between the union agents and the exiting employees' cars.

[1] This case was initially set to be heard on a calendar-call basis in connection with Hoschton Garment Company, A Subsidiary of Spencer Industries, Inc., Cases 10-CA-18741, and 10-CA-18618. At the opening of the hearing in those cases, the General Counsel moved to consolidate such cases with the instant case, it appearing that the cases shared witnesses, legal representation, and legal issues. The General Counsel's motion was granted as was the further motion to sever the cases prior to issuance of a decision in the cases. Accordingly, an Order severing the instant case from the *Hoschton* cases issued on September 2, 1983.

1983, when three representatives of the Union, James B. Sala, Gary Adler, and John Montgomery, engaged in handbill distribution to Respondent's employees at the two driveway entrances to Respondent's plant. Respondent's plant faces an industrial road called Memorial Park Road, but sits off the road an estimated distance of from 200 to 400 feet. Two parallel, paved driveways separated by a distance equal to the width of the plant run from Memorial Park Road down each side of the plant and are utilized by employees entering and exiting the plant area by motor vehicle. They are joined only by a parking area across the front of the plant at the main plant entrance. The plant premises are not fenced in any manner and no gates exist on the driveways. For the purposes of this decision the driveway entering the plant premises on the left as one faces the plant from Memorial Park Road shall be referred to as driveway A, while the parallel driveway to the right shall be referred to as driveway B.

International Representative Sala testified that he, Adler, and Montgomery went to Respondent's plant to distribute handbills to employees arriving shortly before 4 p.m., the normal employees' quitting time. They parked their car across Memorial Park Road in front of the plant and Sala took up a position at the entrance of driveway A, while Adler and Montgomery took up positions at the entrance of driveway B. Having anticipated that Respondent might raise an issue with respect to intrusion on its property rights through the handbilling[2] the union representatives, according to Sala's testimony, had checked with county officials and had found that a right-of-way existed along Memorial Park Road in front of Respondent's plant. The right-of-way was described by the officials, according to Sala, as either being 30 feet wide so as to include 5 feet either side of the paved road, or running between the ditches on either side of the paved road.[3]

Sala testified that as he, Adler, and Montgomery took up their respective positions, officials of Respondent came out of the plant and approached them. He identified Manufacturing Manager Bernard Tanner as going to the position of Adler and Mongomery while Respondent's supervisor, Jerry Castleberry, and head mechanic, Mike McEver, came to Sala's position. According to Sala, Castleberry told him he was trespassing, and he asked Sala to leave. Sala refused saying he was there to leaflet the employees, and he intended to stay within the 5-foot right-of-way. Castleberry acknowledged there was a right-of-way. Nevertheless, as the employees began to exit the drive, Castleberry attempted to impede Sala in giving leaflets to the cars. However, after Sala's protestation that Castleberry was violating workers' rights, Castleberry stepped aside a few feet and continued to watch Sala distribute the leaflets. From time to time Castleberry remarked that Sala was trespassing.

Near the end of the leafleting a policeman, called by Respondent, arrived and pulled his vehicle into one of the drives where he consulted with Tanner, Castleberry, and McEver. The policeman then proceeded to Sala's position at driveway A where Sala, and also Adler who apparently had come over from the B driveway, advised the policeman that they were within the right-of-way. Despite Tanner's request that the union agents be removed, the policeman left remarking that since there was no apparent problem he was not going to remain and listen to the parties argue. He thereupon left, and the leafleting being completed at the point, the union agents left. Sala maintained that he remained with the right-of-way during all the handbilling.

Sala's testimony was largely substantiated by Adler. Adler added that when he was approached by Tanner as Adler started handing out the leaflets Tanner told Adler he was trespassing, that they did not need a union at Gainesville and that Adler should leave Respondent's property. At times Tanner stepped between Adler and exiting cars. Also during the course of the handbilling Tanner accused Adler several times of going too far into the drive, but Adler testified herein that he constantly remained within the 5-foot right-of-way. He specifically denied that he went as far into the drive as the second car in line to exit.

Respondent presented four witnesses to dispute the extent the union agents entered on Respondent's premises. Thus, Tanner generally testified that the union representatives entered the drives by 1-1/2 car lengths. Castleberry testified he first observed Sala about 30 feet inside driveway A, and that when Sala first began distributing leaflets, he did so at a point about 15 feet from the junction of the drive and Memorial Park Road. Further, Castleberry claimed that, on at least one occasion, Sala went down as far as the third car in line to exit to give out a handbill.

Cheryl Ann Parks, an employee of Respondent, testified that Sala gave her a leaflet when she was about the third car in line to exit. He then proceeded to the car behind her. Parks testified she did not observe Castleberry in the area at the time. Another employee, Alec Bagwell, testified that from within the plant he observed Adler at driveway A come approximately 75 feet down the drive toward the plant to distribute leaflets.

The record does not establish that Respondent had a no-solicitation or no-distribution rule applicable at the Gainesville facility. Moreover, there was no evidence that Respondent posted its premises against trespassing. Finally, there is no contention here that handbilling herein presented a traffic problem or hazard.

B. *Arguments and Conclusions*

The testimony of the witnesses presented with respect to the handbilling on October 13 cannot be reconciled. If one believes the General Counsel's witnesses, Sala and Adler, no trespassing occurred. Conversely if one believes Respondent's witnesses, the union agent entered

[2] Such anticipation was based on experience at Hoschton Garment Company, a related company, on October 5 when the union atempted to handbill at that plant.

[3] Respondent herein did not dispute the existence of the right-of-way or either description of the right-of-way related by Sala. There is some dispute in the record as to whether a ditch existed on Respondent's side of the road. Photographs of the area received in evidence reveal at least a depression on Respondent's side of the road, whether or not it may be referred to as a ditch.

onto Respondent's premises substantially beyond the limits of the Memorial Park Road right-of-way.

Both Sala and Adler impressed me as truthful witnesses concerned with an accurate presentation of the facts as they recalled them. I am convinced that they made an honest effort to stay within the road right-of-way during the leafleting. Moreover, it is improbable, based on their prior experience with Tanner at Hoschton, that they would have taken the trouble to ascertain the existence of and the extent of the right-of-way if, in fact, they intended to ignore it.

Weighed against the testimony of Sala and Adler, Tanner's testimony appears more generalized and it must be considered in the context of Tanner's admitted opposition to the Union. I found Tanner less convincing than Sala and Adler and, accordingly, I do not credit him where he is contradicted by either of them.

Castleberry, too, I found less convincing. Castleberry maintained that he stayed with Sala for a period of 15–20 minutes at a point 30 feet inside the drive. While he claimed he moved out of his tracks occasionally he testified that he maintained that position generally. Yet photographs taken by Montgomery and received in evidence reflect Castleberry and McEver observing Sala from a point which appears to be substantially less than 30 feet inside the drive. Although these same photographs do not establish the respective positions of the parties for the entire time of the handbilling, they tend to support Sala's testimony that he handbilled generally within 5 feet of the edge of Memorial Park Road.

Bagwell's testimony I also found unpersuasive. Bagwell's identification of Adler as coming down 75 feet inside of driveway A at one point and even talked to the policeman at that location, no other witness testified that Adler even handbilled at that location. Moreover, Bagwell was an officious intermeddler who sought to inject himself into the situation to curry favor of Respondent by leaving the plant while on duty and without authorization to join Tanner in the handbilling area.

Parks was a more likely impartial witness. She admittedly, however, was concerned with traffic and the cars in front of her and it appeared that she was moving at the time the leaflet was given her by Sala. Moreover, she admittedly did not even see Castleberry or McEver as she passed out the entrance, although they were clearly there at the start of the handbilling. Parks apparently was one of the first ones out and testified she usually was the first one out. I am not persuaded therefore that Parks' observations were entirely accurate regarding the extent of Sala's entry into driveway A.

Considering all the foregoing, and the record as a whole, I find the testimony of Sala and Adler the most credible and accurate.

The General Counsel and Charging Party contend that there was no trespassing by the union representatives and therefore Respondent's efforts to exclude them from handbilling on public property violated employee rights under Section 8(a)(1) of the Act. Moreover, the constant and close observation of the handbilling is urged to constitute unlawful surveillance also violative of Section 7 of the Act. Respondent's defense is based on its contention that there was not only a likelihood of trespassing by the union agents but an actual trespass which warranted all its actions in the interest of protection of its property rights. In this regard Respondent relies on *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1965), wherein the Supreme Court held that an employer may bar distributions on its premises by nonemployee union organizers so long as the union has other means of communicating with employee and the employer does not discriminate against the union by allowing other distribution. It is to be noted that there was no evidence presented herein to establish either that the Union lacked other reasonable means of communication or that Respondent discriminated against the Union by allowing other distributions.

Based on the credited evidence I find that there was no trespassing upon Respondent's premises, and that the handbilling took place on a right-of-way for a public road. It is clear also from the credited evidence, and I find, that Respondent asked the union agents to leave, and even sought their removal by calling the police. Moreover, based on Sala's credited testimony, Castleberry even sought initially to impede the handbilling by physically stepping in front of Sala. Tanner, according to Adler's credited testimony, also did the same thing. This action by Respondent unquestionably violated Section 8(a)(1) of the Act for it interfered with employee rights to receive union literature as the complaint alleges. See *Schlegel Oklahoma*, 250 NLRB 20 (1980), enfd. 644 F.2d 842 (9th Cir. 1981); *Winnett, Inc.*, 135 NLRB 1305 (1962). Cf. *Hutzler Bros. Co.*, 241 NLRB 914 (1979).

In addition, Tanner's presence with that of Respondent's other representatives, Castleberry and McEver, close to the union representatives for a period of 15 to 20 minutes during the course of the handbilling when coupled with Tanner's admitted opposition to the Union, I conclude, intended to interfere with the handbilling and, thus, the receipt by employees of such handbills. Whether or not intended, Respondent's conduct had a clear and obvious tendency to interfere with employee receipt of the union literature. It is the tendency of Respondent's conduct to be coercive which determines the violation and not the actual effect. See, e.g., *NLRB v. Huntsville Mfg. Co.*, 514 F.2d 723, 724 (5th Cir. 1975); *NLRB v. Camco Inc.*, 340 F.2d 803, 804 fn. 6 (5th Cir. 1965). Accordingly, I find the close presence of the representatives of Respondent during the handbilling constituted obvious overt and intended surveillance of union activities on a public road right-of-way. Respondent, therefore, further violated Section 8(a)(1) in this regard as contended by the General Counsel and Charging Party. *Reeves Southeastern Corp.*, 256 NLRB 574 (1981).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act on October 13, 1983, by attempting to prohibit union handbill distribution to its employees on a public road right-of-way and by watching and interfering with employee receipt of union handbill distributions.

4. The violations of the Act above in paragraph 3 constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in the unfair labor practices set forth above, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act to include the posting of an appropriate notice to its employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Gainesville Manufacturing Co., Inc., a Subsidiary of Spencer Industries, Inc., Gainesville, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Attempting to prohibit handbill distributions to its employees on a public road right-of-way by International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization.

(b) Surveillance of, or interference with, its employees' receipt of handbills distributed by International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Post at its Gainesville, Georgia place of business copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a full hearing in which both sides had an opportunity to present evidence, the National Labor Relations Board has found that we have violated the Act and has ordered us to post this notice.

The Act gives all employees these rights.

To engage in self-organization

To form, join, or help Unions

To bargain collectively through representatives of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all these things.

WE WILL NOT attempt to prohibit handbill distribution to our employees, on a public road right-of-way by International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization.

WE WILL NOT engage in surveillance of, or interference with, our employees' receipt of handbills distributed by the above-named or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights under Section 7 of the Act as listed above.

GAINESVILLE MANUFACTURING CO., INC.,
A SUBSIDIARY OF SPENCER INDUSTRIES,
INC.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."